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No. 07-1103

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In The
Supreme Court of the United States

T-MOBILE USA, INC., VERISIGN, INC., and JAMSTER INTERNATIONAL SARL,

Petitioners,

v.

CHARLES FORD, CAROL FOX DE STEFANO, individually and on behalf of all other persons similarly situated and the general public,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT W. THOMPSON*
KATHLEEN HARTMAN
CHARLES S. RUSSELL
CALLAHAN, MCCUNE & WILLIS, APLC
111 Fashion Lane
Tustin, CA 92780
(714) 730-5700

Attorneys for Respondents Charles Ford, Carol Fox De Stefano, individually and on behalf of all other persons similarly situated and the general public

**Counsel of Record*

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QUESTION PRESENTED

Is a state required to enforce a class action waiver because it is contained within an arbitration agreement when the state would be free to find the same class action waiver invalid if it was contained in a contract that did not have an arbitration agreement?

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STATEMENT OF THE CASE

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, states that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon *such grounds as exist in law or equity for the revocation of any contract.*" (Emphasis added). Nowhere in the FAA is there authority to hold arbitration agreements above other contracts. Rather, it is settled law that the FAA places "arbitration agreements on *equal footing* with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegan,* 546 U.S. 440, 443 (2006) (emphasis added); *see also Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996).

Despite settled law, Petitioners seek to abrogate long standing principals of jurisprudence and elevate arbitration agreements to a status above other contracts. There is no "state-law principal" involved in this case that "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas,* 482 U.S. 483, 493 fn. 9 (1987), as Petitioners suggest. Instead, Petitioners take a contract term that is otherwise unenforceable in an agreement without an arbitration provision and tether the enforcement of that term to the enforcement of the arbitration agreement as a whole. Then, when that contract term is found unconscionable under generally applicable state-law principals and the arbitration agreement is voided by the very terms T-Mobile drafted, Petitioners cry foul and claim that arbitration agreements are being singled out for treatment different than other contractual agreements.

If a contract term that would otherwise be considered unconscionable is enforceable simply because it is contained in an arbitration agreement, then arbitration agreements are given special treatment at the cost of state substantive law generally applicable to all contracts. This position is contrary to previous holdings by this Court as well as the plain language of the FAA.

Furthermore, there is no conflict, as suggested by Petitioners, between the Third Circuit ruling in *Gay v. CreditInform,* 511 F.3d 369 (3d Cir. 2007) in and the Ninth Circuit's rulings in *Shroyer v. New Cingular Wireless Services, Inc.,* 498 F.3d 976 (9th Cir. 2007) and *Lowden v. T-Mobile USA, Inc.,* 512 F.3d 1213 (9th Cir. 2008). The court in *Gay* never considered an arbitration agreement that, by the very terms drafted by the party seeking arbitration, would be rendered unenforceable if a class action waiver contained in the agreement was found unconscionable. Nor did the court in *Gay* even consider a law of general applicability as did the courts in *Shroyer* and *Lowden*.

Respondents request Petitioners' writ for certiorari be denied. Respondents additionally request that this matter not be stayed pending disposition of the petition for certiorari in *T-Mobile USA, Inc. v. Laster,* No. 07-976 (filed January 23, 2008).

STATEMENT OF FACTS

Respondents seek to represent millions of mobile phone users who, after sending a text message or responding to an Internet advertisement, were unknowingly signed up to a subscription for Jamster products and services with reoccurring charges. (Petitioners' [Pet.] Brief p. 20a). Jamster would advertise ringtones and wallpapers on the television and Internet. (*Id.* at 22a.) Consumers, many of whom were children, would see the advertisements and send a text message to obtain a single ringtone or wallpaper. (*Id.* at 20a & 22a.) Unbeknownst to the consumer, by sending a single text message they were actually signing up for a weekly and/or monthly subscription that resulted in reoccurring charges ranging from $1.99 to $5.99. (*See e.g. id.* at 14a, 22a.) T-Mobile[1] would place these charges on the consumer's monthly phone bill as well as charge consumers for text messaging charges associated with Jamster products and services. (*See e.g. id.* at 14a, 20a). When consumers attempted to cancel the services they faced tremendous roadblocks. Some consumers were forced to cancel their entire mobile phone service in order to avoid accruing any more charges. Respondents brought a class action to stop the abusive practices engaged in by Petitioners and Cingular.

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[1] Cingular is also a party to this action but withdrew its appeal to the Ninth Circuit following the decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

After filing the Complaint, T-Mobile sought to enforce its arbitration agreement that consumers are required to accept as a condition for using T-Mobile's products and services. VeriSign, Inc. and Jamster International Sarl claimed rights under the arbitration agreement as third party beneficiaries. VeriSign, Inc. and Jamster International Sarl also claimed third party beneficiary rights under the Cingular agreement but chose, like Cingular, to not pursue appeal of the matter after the decision in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

As part of T-Mobile's mandatory arbitration agreement, T-Mobile requires consumers waive their right to resolve disputes through a class action or a representative action. T-Mobile ties application of the arbitration provision to enforcement of the class action waiver. Specifically, T-Mobile includes the following language in its agreement:

> "IF A COURT OR ARBITRATOR DETERMINES THAT YOUR WAIVER OF YOUR ABILITY TO PURSUE CLASS OR REPRESENTATIVE CLAIMS IS UNENFORCEABLE, THE ARBITRATION AGREEMENT WILL NOT APPLY AND OUR DISPUTE WILL BE RESOLVED BY A COURT OF APPROPRIATE JURISDICTION . . . " (Pet. Brief at 30a-30b (capitalization original).)

This term, as well as every other portion of the arbitration agreement, was drafted by T-Mobile.

In ruling on T-Mobile's Petition to Compel Arbitration, the district court applied state substantive law concerning class action waivers as set forth by the California Supreme Court in *Discover Bank v. Superior Court (Boehr),* 36 Cal.4th 148, 113 P.3d 1100 (Cal. 2005). The Court in *Discover Bank* provides the following analysis as to the enforcement of class action waivers in general:

> "We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' ([Cal.] Civ. Code § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Discover Bank,* 36 Cal.4th at 162-163; 113 P.3d at 1110. (*See also* Pet. Brief at 13a-14a.)

Notably, whether or not the class action waiver is included as part of an arbitration agreement has no bearing on the determination of whether the class

action waiver is unconscionable. In fact, the California Supreme Court stated:

> "the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." *Discover Bank*, 36 Cal.4th at 165-166; 113 P.3d at 1112.

The district court, applying the principals outlined in *Discover Bank* to the class action waiver, properly found the waiver unconscionable. (Pet. Brief at 17a.) Accordingly, the district court ruled that "[b]ecause the arbitration provisions expressly provide that the invalidation of the class action waiver will void the entire provision, the Court does not have the option of severing the class. Therefore, the Court denies the motion to compel arbitration as to both T-Mobile and Cingular." (*Id.*)

Petitioners then appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit denied the appeal, following the precedent set forth in *Shroyer*.

REASONS FOR DENYING THE WRIT

Petitioners have failed in their Petition for Writ of Certiorari to present an issue of imperative public importance that would justify deviation from normal appellate procedure. There is no constitutional question at issue in this matter, this Court has already spoken as to the requirement that the FAA be placed on the same legal footing as other contracts, and there is no conflict between the Circuit Courts of Appeals. The writ procedure should not be used as a mechanism by which a party who is unhappy with a contract term that it drafted can avoid the results of its own actions or forestall litigation affecting a large group of consumers.

A. The "Question Presented" By Petitioners Does Not Apply To This Action

The "Question Presented" as framed by Petitioners does not apply to the present action. Neither the district court nor the Ninth Circuit Court of Appeals refused "to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer." (Pet. Brief at p. i.) Instead, the district court applied generally applicable state-law and found the *class action* waiver to be unconscionable. Because the very terms of the agreement drafted by T-Mobile prohibited arbitration if the class action waiver was found unenforceable, the district court could not order arbitration. As such,

Petitioners have failed to present this Court with a question that is applicable to the facts and circumstances of this action.

B. Application Of State Substantive Law Concerning Class Action Waivers Does Not Implicate The FAA

The FAA is not applicable to state substantive law concerning enforcement of class action waivers. In *Amchen Products, Inc. v. Windsor,* 521 U.S. 591, 617 (1997), this Court affirmed that class actions are important procedural means for resolving disputes involving small amounts of money: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." California has long held that classwide arbitration is an available procedure for resolution of disputes. *Keating v. Superior Court*, 31 Cal.3d 584, 613-614 (1982), 645 P.2d 1192, *overruled on other grounds in Southland Corp. v. Keating*, 465 U.S. 1 (1984). However, the fact that class actions can be arbitrated does not preclude states from finding class action waivers unconscionable under certain circumstance that are completely separate from whether or not they are contained in an arbitration agreement.

The FAA was never intended as a means to dictate to states what laws can apply to the revocation of contracts in general. *See* 9 U.S.C. § 2. Rather,

the purpose of the FAA was to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219 (1985). In denying arbitration in this action, the district court enforced the agreement as drafted by T-Mobile. Specifically, the district court found that "[b]ecause the arbitration provisions expressly provide that the invalidation of the class action waiver will void the entire provision, *the Court does not have the option of severing the clause.*" (Pet. Brief p.17a (emphasis added).) The FAA does not require courts to make terms that are otherwise unenforceable enforceable because they are contained in an arbitration agreement. *Prima Paint v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 fn. 12 (1967) (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so"). Had T-Mobile not included a clause voiding the arbitration provision, this action would likely be in arbitration as a class action.

C. There Is No Conflict Between The Ninth Circuit And The Third Circuit As To The Issue Of Class Action Waivers In Arbitration Agreements

Petitioners seek review of this matter based, in part, upon what they believe is a conflict between the Third Circuit's ruling in *Gay v. CreditInform,* 511 F.3d 369 (3d Cir. 2007) and the Ninth Circuit's rulings in *Shroyer* and *Lowden.* However, no such conflict exists.

The plaintiff in *Gay* sought to defeat arbitration by claiming the *statutes* upon which she based her claims required a judicial forum, thus precluding arbitration in general. *Id.* at 379. Plaintiff further claimed that a specific statute provided her the right to assert her claims as a class action. *Id.* In particular, plaintiff "argues with respect to its terms the arbitration provision is unconscionable because it requires cases to proceed 'on an individual basis not consolidated with any other claim,' . . . and therefore is 'the functional equivalent of a denial of Ms. Gay's request to represent a class of similarly situated consumers.'" *Id.* at 392. Essentially, plaintiff sought to invalidate the entire arbitration agreement because it contained a class action waiver.

In *Shroyer* and in *Lowden,* the Ninth Circuit applied California and Washington law, respectively, to the class action waiver. After application of the holding in *Discover Bank*, the court in *Shroyer* found the class action waiver unconscionable and, because the Cingular arbitration provision had a nonseverability clause voiding the arbitration agreement and prohibiting an arbitrator from presiding over a class action, arbitration could not be compelled. *Shroyer,* 498 F.3d at 986-987. The Ninth Circuit in *Lowden* came to the same conclusion after applying Washington state-law to a T-Mobile contract. *Lowden,* 512 F.3d at 1221. Furthermore, in the opinion in *Lowden,* the Ninth Circuit specifically addressed and distinguished the decision in *Gay*: "[u]nlike the Third Circuit's conclusion as to the applicable state law in

Gay, we determine that the Washington Supreme Court in *Scott* does not hold 'that an agreement to arbitration may be unconscionable simply because it is an agreement to arbitrate.'" *Id.* at 1221 fn. 3 *citing Gay,* 511 F.3d at 395.

Petitioners also attempt to tie the state court decision of *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), to this litigation in order to bolster their illusion of conflict between the Circuits. The issue before the court in *Tillman* was not the same as the issue before Ninth Circuit in *Shroyer* and in *Lowden*. In *Tillman,* the Court looked at the *entire* arbitration agreement, which happened to contain a class action waiver, and determined the *entire* agreement was unconscionable. *Tillman,* 655 S.E.2d at 370. Finding that an arbitration agreement is unconscionable under generally applicable state-law principals has long been permissible under the FAA. *Doctor's Assocs., Inc.,* 517 U.S. at 686.

In *Shroyer, Lowden* and the present case, however, the Courts found the *class action waiver* unconscionable under generally applicable state-law principals and, as a result of the nonseverability language in the contracts at issue, could not order arbitration.

There is no conflict between the Circuits that support granting writ relief. Therefore, Respondents request this Court deny Petitioners' petition.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT W. THOMPSON
Counsel of Record
KATHLEEN HARTMAN
CHARLES S. RUSSELL
CALLAHAN, MCCUNE &
WILLIS, APLC
111 Fashion Lane
Tustin, CA 92780
(714) 730-5700